peals of New York has held, as late as the case of *Townshend* v. *Thomson,* (now interpreted as resting on acquiescence,) that the mortgagee in possession can defend his possession until his mortgage is paid. That case has not as yet been questioned as to this point, but it will be sooner or later and the courts will have to decide whether they will follow the logic of the lien theory further, or cling to this fragment of the older law.

E. N. D.

DOWER IN AN ESTATE IN FEE SUBJECT TO AN EXECUTORY DEVISE.—For the first time the question whether a wife has dower in an estate held by her husband in fee subject to an executory devise has arisen in Rhode Island. *Sheffield* v. *Cooke,* 98 Atl. 161. One J. J. C., seised in fee, devised lands to his son, H. W. C., his heirs and assigns forever, "if, however, * * * my younger daughter A. E. C. survive my said son and his descendants," then all lands over to X. H. W. C. married, had two children who are living, and died, his wife A. H. R. C. surviving. A. E. C. is still alive and H. W. C.'s wife is claiming dower. While it is evident that since H. W. C.'s descendants are still living the contingency on the happening of which the fee in H. W. C. would be terminated has not occurred, yet as it was necessary for the court to decide whether any dower set off to A. H. R. C. would be terminated if the executory limitation should take effect, the question was squarely raised. The court decided it in accordance with the weight of authority, that the happening of the contingency and the limitation of the estate of the husband over to X would have no effect on the dower rights of the wife.

It might be thought that because dower and curtesy are at least dependent upon an estate in the husband or wife, as the case may be—if they are not even incidents of that estate—that any termination of such estate would destroy or terminate the dower or curtesy. But a long time ago some decisions were made which are hard to explain other than as exceptions to the above seemingly logical statement. By these decisions it was settled that curtesy or dower persists in a fee simple estate which has escheated for want of heirs, or in a fee tail estate which has reverted to the grantor because of failure of the specified sort of heirs. *Paine's Case* (*Samnes* v. *Paine*), 8 Coke 34a, 77 Eng. Rep. 524; 2 COKE, LITTLETON, (Butler and Hargrave's edition), 241a, note. Why these cases were decided as they were is rather hard to say. Reasons have been given, such as COKE'S "for that it is *tacite* implied in the gift." But, as BRIGHT queries, if the estate itself has been defeated by the death of the holder without heirs why should a mere incident of that estate, a something attached to it *tacite,* by implication, survive? Probably because the early judges desired to protect dower and curtesy, and after having done so, sought to explain their action by principles "rather to be guessed at than demonstrated." 2 BRIGHT, HUSBAND & WIFE, 467.

However if the estate granted to the husband was subject to a condition subsequent, for breach of which the grantor entered, then by legal legerdemain the grantee's estate was considered as void *ab initio* and, of course, the dower attached to such estate perished. PARK, DOWER, 70; 4 KENT, COMM. (12th ed.) 49.

KENT distinguishes between these two cases (4 KENT, COMM. (12th ed.) 34,) in that where a donor enters for a breach of condition he destroys the estate he had granted, whereas when an estate escheats or reverts it merely shifts, and whatever incidents were attached to it persist. This is not a distinction without a difference and arises logically if it be granted that COKE correctly stated the law when he said that to every estate granted there was *tacite* granted also the right to have dower attach to that estate though the heirs to whom the estate was granted fail, and that PARK correctly stated the legal theory that the entry of a grantor for condition broken avoids the estate.

So when we come to the question whether dower should persist in an estate in fee subject to an executory devise, but one thing need bother us: does such a limitation shift the estate, or does it, like an entry for condition broken, avoid the estate? The courts have not openly answered this question, and the majority of them have been content to follow *Buckworth* v. *Thirkell,* 3 Bos. & Pul. 652, 127 Eng. Rep. 351, note. This case decided that a husband was entitled to curtesy in an estate held by his wife in fee simple, subject to an executory devise. The courts apparently in following *Buckworth* v. *Thirkell* have often failed to understand the mooted questions they were so lightly passing over. Lord MANSFIELD, in rendering his opinion in *Buckworth* v. *Thirkell,* proceeded on the theory that an executory devise was merely a limitation, in the sense that a fee tail estate is limited, rather than a condition; that, consequently, the rule which earlier cases had made applicable to limited estates was applicable here, *i. e.,* that dower was not barred. PARK contends that an executory limitation is really a conditional limitation to which the contrary rule should apply. As a reason for this belief he cites the fact that the devisee of an estate in fee subject to an executory limitation over could not prevent the operation of the limitation, whereas the devisee of an estate tail could bar the entail, and, moreover "the distinguishing feature of all devises in fee subject to an executory devise is, that after the whole fee is first devised, it is made *defeasible* by a subsequent clause. Now, neither an estate in fee simple conditional, nor an estate tail, has any such defeasible quality or incident annexed to it, but this quality forms the very essence of all other estates on condition." PARK, DOWER, 83. Other writers have agreed with PARK: 4 KENT, COMM. (12th ed.) 50; 2 BRIGHT, HUSBAND AND WIFE, 467. Some few cases have been content to follow these text writers rather than the case of *Buckworth* v. *Thirkell*: *Weller* v. *Weller,* 28 Barbour (N. Y.) 588; *Hatfield* v. *Sneden,* 42 Barbour (N. Y.) 615; *Edwards* v. *Bibb,* 54 Ala. 475. But the vast weight of authority is in accord with *Buckworth* v. *Thirkell. Moody* v. *King,* 2 Bing. 447; *Evans* v. *Evans,* 9 Barr (9 Pa.) 190; *Northcut* v. *Whipp,* 12 B. Mon. (Ky.) 65; *Millege* v. *Lamar,* 4 Desaus. (S. C.) 617. In support of these cases which have allowed dower or curtesy in such an estate, propably all the reasons of policy, which made COKE and his associates anxious to preserve rather than to defeat dower and curtesy, still exist. Besides this, there is that sanction which comes from any law, logical or illogical, that is venerable if not venerated. Probably it breeds less confusion to have another jurisdiction sanction and adopt a rule which most of

its neighbors have long sworn by, if the rule is not vicious, than to have it declare and uphold a rule possibly more logically in accord with some of the antique land laws. H. J. C.

WHAT CONSTITUTES "BEING ON DUTY" UNDER THE HOURS OF SERVICE ACT.—The Federal HOURS OF SERVICE ACT of 1907 (34 Stat. at L. 1415, Comp. St. 1913, §§ 8677-8680) provides, in part, that it shall be "unlawful for any carrier * * * to require or permit any employe * * * to be or remain on duty for a longer period than sixteen consecutive hours;" with the further proviso in § 2: "Provided that no operator, train dispatcher, or other employe, who, by the use of telephone or telegraph dispatches, receives or delivers orders pertaining to or affecting train movements, shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places and stations continuously operated night and day * * *." A proviso is also stated, excusing such overtime service in case of "emergency, unavoidable accident, or act of God." In the recent case of *Oregon Short Line R. Co.* v. *United States*, 234 Fed. 584, the Circuit Court of Appeals for the Ninth Circuit held that the defendant company was liable to the penalties imposed by this Act, even though the company had expressly forbidden and prohibited its telegraph operator to work more than nine hours, and he, in violation of said instructions, put in three hours overtime without the company's knowledge, and not as an operator, but at clerical work; that Congress had originally inserted the word "knowingly" before the word "permitted," but had later stricken it out, thereby showing the intention that the act should cover exactly such a case as that before the court; that the defendant was charged with knowledge of the acts of its servants; and that under any other view the manifest purpose of the statute would be defeated, as convictions would under such circumstances be practically impossible.

As the Circuit Court of Appeals points out, the purpose of the HOURS OF SERVICE ACT is not penal, but remedial—to protect not only the employes of the railroads, but to protect also the safety of the public; and the courts have kept this purpose in view in their interpretation of the ACT and in their definition of its terms, as will appear from an examination of the cases that have arisen under the ACT.

Thus the carrier cannot avoid the provision against requiring or permitting an employe from remaining on duty for a "longer period than nine hours in any twenty-four-hour period" by dividing the hours of service into two periods, if the aggregate hours of service each day of twenty-four hours exceed nine hours. *U. S.* v. *St. Louis Southwestern Ry. Co. of Texas*, 189 Fed. 954. As to the possibility of breaking up the period of service, THORNTON summarizes the authority as follows: "The time can be divided, provided such break is bona fide and customary; the term "period" does not mean a cycle, or something continuous, as Congress had no intention of overriding such well known customs." THORNTON, FEDERAL EMPLOYER'S LIABILITY AND SAFETY APPLIANCES ACTS, (2 ed. § 246. In *U. S.* v. *Northern Pacific R. Co.*, 213 Fed. 539, it was held that a lay-off of a train crew for one and one-half hours by